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December 4, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: MM Docket No. 90-380
Motion To Dismiss Joint Request For Approval
Of Settlement Agreement And Opposition To
Joint Request For Approval Of Settlement Agreement

Dear Ms. Roman Salas:

Enclosed for filing, on behalf of Irene Rodriguez Diaz de McComas, are an original and fourteen (14) copies of a Motion To Dismiss Joint Request For Approval Of Settlement Agreement And Opposition To Joint Request For Approval Of Settlement Agreement. Also enclosed is an additional copy of this letter for stamping and return in the enclosed self-addressed stamped envelope.

Please address all correspondence and phone inquiries pertaining to this matter to:

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(212) 541-1072 (JSB) / (212) 541-2277 (AI)

Very truly yours,

Jerome S. Boros AI

Jerome S. Boros
Attorney For
Irene Rodriguez Diaz de McComas

Encls. (17)

cc: All parties on List 1 w/encl.

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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DEC - 4 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 90-380
)	
RIO GRANDE BROADCASTING CO.)	File No. BPH-880815MV
)	
ROBERTO PASSALACQUA)	File No. BPH-880816NN
)	
IRENE RODRIGUEZ DIAZ De McCOMAS)	File No. BPH-880816OR
)	
UNITED BROADCASTERS COMPANY)	File No. BPH-880816OW
)	
)	
For Construction Permit of a New FM Broadcast)	
Station On Channel No. 247A at Rio Grande,)	
Puerto Rico)	

To: The Commission

MOTION TO DISMISS JOINT REQUEST FOR
APPROVAL OF SETTLEMENT AGREEMENT
AND
OPPOSITION TO JOINT REQUEST FOR
APPROVAL OF SETTLEMENT AGREEMENT

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AND
OPPOSITION TO JOINT REQUEST FOR
APPROVAL OF SETTLEMENT AGREEMENT

Irene Rodriguez Diaz de McComas ("McComas"), by her attorneys, hereby moves to dismiss the Joint Request for Approval of Settlement Agreement (the "Request") filed by Rio Grande Broadcasting Co. ("RGB") and United Broadcasters Company ("United"), and opposes the Request.

Summary of the Filing Pursuant to Commission Rule 1.49(c)

1. McComas moves to dismiss the Request upon the ground that it is barred by the First Report And Order adopted August 6, 1998 and released August 18, 1998 in

Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, FCC 98-194, 63 F.R. 48615, 13 CR 279 (the "Auction Order"). The proposed settlement and the Request for its approval are conditioned upon the dismissal of the competing McComas and Roberto Passalacqua ("Passalacqua") applications. The Auction Order gives McComas the right to participate in an auction for the Rio Grande permit prior to disposition of the pending (and, as set forth below, meritless) challenge to her application. The fact that RGB and United propose to resolve their mutual exclusivity by a settlement cannot abrogate that right and deprive McComas, the Commission, the public generally and the public fisc in particular, of the benefits of an auction.

2. In addition, McComas opposes the Request upon the ground that there is no procedural or substantive basis for dismissing her application. The Review Board reinstated McComas' application prior to the 1991 comparative hearing and no party sought review of that reinstatement at the time. Moreover, nothing emerged at the hearing to cause either the Administrative Law Judge or the Review Board to find McComas' application defective, and decisive Commission precedent confirms that McComas remains a qualified applicant.

3. Finally, to the extent the Request also seeks immediate grant of United's application based on the proposed settlement, RGB and United should be required to make a showing of the merged entity's financial qualifications to build and operate the station.

Preliminary Statement of McComas' Position

4. McComas, RGB, United and Passalacqua are the four surviving applicants for a new commercial FM broadcast station to operate on FM Channel No. 247A at Rio Grande,

Puerto Rico. After an Administrative Law Judge conducted a comparative hearing in 1991, he granted RGB's application. After considering exceptions, the Review Board reversed, ordering that the permit be granted to United and dismissing Passalacqua's application because of the absence of a viable site and good cause for amending to such a site. The applications of RGB and McComas were denied on comparative grounds. McComas, Passalacqua and RGB, but not United, filed applications for review with the Commission. The RGB Application For Review did not mention McComas. Put otherwise, neither United nor RGB preserved its right to contest the McComas application, other than on comparative grounds. However, because the applications for review raised comparative issues, they have not been processed pursuant to the Commission's freeze policy issued in the wake of Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) ("Bechtel II"). This matter has laid dormant except that all four applicants participated in the rulemaking proceeding involving implementation of the auction and other provisions of Sections 309(j) and (l) of the Communications Act. RGB and United argued against auctions for this case and other affected by the freeze. Having lost, they now seek to end-run the auction procedure.

5. The Request attempts to avoid an auction by seeking approval of an agreement between RGB and United to merge their interests by forming a new entity which would then be granted the construction permit at issue upon the simultaneous dismissal of McComas' and Passalacqua's conflicting applications. The Auction Order has rendered these machinations unavailable, having implemented § 309(l)(2) of the Communications Act by granting all parties to frozen comparative proceedings whose applications were filed prior to July 1, 1997 the right to participate in an auction. The Request would abrogate McComas' right to participate in the auction, contrary to the Commission's directive. Moreover, since the Request

also seeks an adjudication prior to an auction concerning the status of McComas' application, it violates the directive set forth in the Auction Order to the effect that auctions in frozen hearing cases be conducted before basic qualifying issues are decided.

6. Finally, the only ground for dismissing McComas' application which does not raise a comparative issue arises out of the fact that McComas' original application included an original signature in one but not all of the places required on the application form. RGB and United have waived this issue and, in any event, Commission precedent and common sense support the conclusion that McComas' application is valid. As a qualifying applicant, she is entitled to participate in the auction that United and RGB appear to be so desperate to avoid, to the detriment of the U.S. Treasury.

Factual and Procedural Background

7. McComas, RGB, United and Passalacqua filed mutually exclusive applications for the permit.¹ McComas' application as filed on the August 16, 1988 deadline date of the "filing window" contained her original signature on her equal opportunity program report but only facsimile-transmitted signatures on the transmitter site certification and ultimate certification pages. The application was accepted for tender and accepted for filing and there was no mention of the signature issue in the Hearing Designation Order issued in 1990, reported at 5 FCC Rcd 5442.

8. In February 1991, some six months after the Hearing Designation Order, Passalacqua moved to dismiss McComas' application because of the absence of an original

¹ Two other applicants were dismissed with prejudice and are no longer participating in the proceeding.

signature on the original application's certification page. The Administrative Law Judge dismissed the application.² With the support of the Mass Media Bureau, the Review Board reversed the Administrative Law Judge.³ The Review Board observed that McComas had furnished original signature pages on August 17, 1988, one day after the application had been filed. The Review Board found that the decisions in Mary Ann Salvatoriello, 6 FCC Rcd 4705, 69 R.R.2d 881 (1991) ("Salvatoriello") and Josephine M. Rodriguez d/b/a Cielo Communications, 3 FCC Rcd 6752 (MM Bur. 1988) ("Cielo") had established that since the text of the Equal Employment Opportunity Certification and the ultimate certification in Section VII of the application form were so similar, the presence of an original signature on the EEO certification is "essentially the same as the unsigned Section VII certification." 6 FCC Rcd at 5519. The Review Board also relied upon its previous ruling in George Henry Clay, 5 FCC Rcd 317, 318 (Review Board 1990) to the effect that the requirements of the so-called "Hard Look Order"⁴ concerning matters such as original signatures on application forms constitute processing guidelines that "are intended to be applied at the initial staff review stage" but should not apply thereafter once a hearing process has begun. Neither RGB, United nor Passalacqua then sought Commission review of the Review Board's decision.

9. Following six days of hearings in December 1991, Administrative Law Judge Gonzalez granted RGB's application and denied Passalacqua's, McComas' and United's

² Memorandum and Opinion, FCC 91 M-2432, released August 6, 1991.

³ Rio Grande Broadcasting Co., 6 FCC Rcd 5519, 69 R.R.2d 1234 (1991).

⁴ Report And Order (Dkt. No. 84-750), 50 Fed. Reg. 19945 (1985), recon. denied, 50 Fed. Reg. 43157 (1985), reprinted in 58 R.R.2d 776 (1985).

applications on comparative grounds.⁵ Although McComas' adversaries vigorously cross-examined her concerning her execution of the application the Administrative Law Judge's opinion contained no finding of impropriety. On exceptions, the Review Board ordered that the permit be awarded to United rather than RGB and McComas and further ordered that Passalacqua's application be dismissed because of the absence of a viable site and Passalacqua's failure to demonstrate good cause for amending to a viable site.⁶ McComas, RGB and Passalacqua each filed an application for review.

10. By virtue of the Freeze Order⁷, the Commission has not acted on the requests for review and all proceedings in this case have been frozen. On August 5, 1997 President Clinton signed the Balanced Budget Act of 1997, P.L. No. 105-33, 11 Stat. 251 (1997) which, inter alia, added a new § 309(l) to the Communications Act to deal with pending comparative broadcast initial licensing cases such as the instant proceeding. Section 309(l) provides:

(l) Applicability of competitive bidding to pending comparative licensing cases

With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall -

(1) have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) to assign such license or permit;

⁵ Rio Grande Broadcasting Co., 7 FCC Rcd 7682 (1992).

⁶ Rio Grande Broadcasting Co., 8 FCC Rcd 6256, 73 R.R.2d 1388 (1993).

⁷ Public Notice, 9 FCC Rcd 6689 (1994).

(2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding; and

(3) waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications during the 180-day period beginning on the date of enactment of the Balanced Budget Act of 1997.

11. By Notice of Proposed Rule Making adopted November 25, 1997 and released November 26, 1997, 12 FCC Rcd 22363 (the "Notice"), the Commission proposed to use its authority under Section 309(l) to conduct auctions to decide among competing applications filed before July 1, 1997, but also requested comment on the proposal and other matters relating to applications filed before July 1, 1997. Both United and RGB filed comments. United urged the Commission to proceed to decide the instant proceeding as one of the twenty unresolved cases that had progressed to at least Initial Decision before the decision in Bechtel II. Specifically, United urged the Commission to decide this and the other cases on the record developed without considering the "integration factor" and, if a case could not be decided on those grounds, the Commission should then adjudicate issues of disqualification pending against the mutually exclusive applicants. Only the applicants who survived these two steps of litigation should then be permitted to participate in an auction. RGB also proposed that the Commission decide pending hearing cases based on developed records without reference to the integration factor. McComas replied to the RGB and United comments and supported use of an auction.

12. The Commission's Auction Order decisively rejected United's and RGB's positions. The Commission determined to use competitive bidding procedures for all cases involving pre-July 1, 1997 applications, including the approximately twenty cases that

progressed at least through Initial Decision by an administrative law judge before the Bechtel II decision. Auction Order at ¶¶52-55. The Commission cited McComas' Reply with approval and specifically identified United and RGB as commentors who urged instead that comparative hearing processes be used to resolve such cases. Id. at nn.53 and 54. The Commission further decided that in such cases the Commission "will permit all pending applicants to participate in the auction, without regard to any unresolved hearing issues . . . as to the basic qualifications of a particular applicant. We will do so regardless of the number of remaining applicants or whether the adverse resolution of outstanding basic qualifying issues would eliminate all but one applicant." Id. at ¶89. Again, the Commission explicitly rejected the argument that basic qualifying issues should be decided prior to the auction, identifying United as a commentor who proposed this rejected position. Id. at ¶90 and n.82.

13. McComas is ready, willing and able to participate in the auction contemplated by the Auction Order.

ARGUMENT

I

THE AUCTION ORDER COMPELS DISMISSAL OF THE REQUEST

14. The Request attempts to circumvent the Commission's decision in the Auction Order giving all pre-July 1, 1997 applicants the opportunity to participate in a competitive auction for the permits for which they had applied. Accordingly, the Request should be dismissed as contrary to the Commission's current rules.

15. The Request does not simply seek approval of the merger agreement between RGB and United, since United and RGB explicitly conditioned their proposed merger and the Request itself on dismissal of McComas' and Passalacqua's applications prior to the conduct of any auction. As explained above, the Auction Order explicitly ruled that issues of applicant qualification such as the signature issue concerning McComas and the site availability issue concerning Passalacqua will only be addressed after completion of the auction, and then only if the relevant party was the successful bidder. The Commission directed the following procedure be implemented:

Following release of this order, the General Counsel, acting on delegated authority, will issue an order in each case identifying the eligible, qualified bidders entitled to participate in the auction, referring all such cases to the Mass Media Bureau for processing in accordance with the auction procedures outlined above . . . , and either stay or terminate the hearing proceeding, depending on whether there are any unresolved hearing issues . . . relating to the basic qualifications of any particular applicant. As proposed in the Notice, 12 FCC Rcd at 22376 (¶30), the hearing proceeding will resume only in the event that such an applicant is the winning bidder.

Auction Order at ¶92.

16. The relief that United and RGB seek, i.e., adjudication of McComas' and Passalacqua's qualifications prior to the auction, is thus no longer available. The quoted language indicates that the processing of the instant proceeding for an auction was to have commenced with the release of the Auction Order on August 18, 1998, almost three months before United and RGB filed their Request. In any event, by operation of Section 1.427(a) of the Commission's Rules, the Auction Order became effective October 11, 1998, almost one month

before the Request was filed.⁸ Examining McComas' application now would violate the Auction Order and could deprive the public – and the U.S. Treasury – of the benefits of an auction.

II

MCCOMAS IS A QUALIFIED APPLICANT FOR THE PERMIT

17. In the unlikely event that the Commission decides, contrary to the Auction Order, to address McComas' qualification, the Commission should find that the Review Board's decision overruling the dismissal of McComas' application correctly applied Commission precedent and common sense. The Review Board correctly found that because McComas' application included an original signature on the Equal Employment Opportunity portion of the application, the fact that there was only a facsimile-transmitted signature on the transmitter site and ultimate certification pages did not render her application fatally defective.

18. As a preliminary matter, we would point out that the Mass Media Bureau's staff did not question the validity of the application when it was initially processed and that the Hearing Designation Order did not make reference to any issue regarding the validity of the application.

⁸ The Rule Amendments set forth in Appendix C to the Auction Order did not become effective until November 10, 1998 but the other portions of the Auction Order are governed by Section 1.427 of the Commission's Rules. The fact that the instant Request was filed after the release and effective date of the Auction Order renders this proceeding decisively distinguishable from Breeze Broadcasting Company, Ltd., FCC 98-286, adopted October 28, 1998 and released November 6, 1998, which involved a Joint Petition for Approval of Settlement filed in December 1997. Thus, the settlement in Breeze, unlike the settlement that is the subject of the Request, pre-dated the Auction Order and was made within the 180-day window for settlement set forth in Section 309(l)(3) of the Act.

19. Neither RGB nor United, individually, nor RGB and United collectively, have standing, at this juncture, to request the Commission to dismiss the McComas application, because of the signature issue. Each of RGB and United waived any rights to Commission review of the Review Board's reinstatement of the McComas application by failing to preserve the point at the time applications for review were filed after the Review Board awarded the permit to United on comparative grounds. As noted, United did not file any application for review; United's Consolidated Opposition To Applications For Review devoted three pages (pp 15-18) to arguing against the McComas application on comparative grounds only. United thus abandoned any rights to argue the signature issue. For its part, RGB's Application For Review also abandoned the issue. RGB's Opposition To Application For Review Of Irene Rodriguies (sic) Diaz De McComas raised (in footnote 6) the point belatedly and improperly, relying only on its exceptions before the Review Board, and RGB's Partial Opposition to Application for Review of Roberto Passalacqua merely referred to and purported to incorporate Passalacqua's argument on the issue in Passalacqua's separate Application for Review.

20. These halfhearted references to other pleadings are inadequate to preserve the application execution issue for review on RGB and United's request⁹. In Capitol Radio Telephone Co., Inc., 3 Communications Regulation 1151 (1996), the Commission, *en banc* stated:

"We note at the outset that aspects of Capitols's application for review did not conform to the Commission's procedural rules. Capitol argues (at 3 n.1) that the errors in the Board's decision are

⁹ Passalacqua, the only party to preserve the application signature issue in his Application for Review, has not joined in the instant Request.

too numerous to set forth in a 10-page application for review and refers the Commission to arguments contained in Capitol's reply to exceptions, filed with the Board. Capitol's attempt to challenge the Board's findings and conclusions in a generalized fashion with reference to its pleadings below does not concisely and plainly state the questions presented for review with reference to the appropriate findings of fact and conclusions of law, as required by 47 CFR §1.115(b)(1). *See also Adjudicatory Reregulation Proposals*, 58 FCC 2d 865, 875-76, ¶ 33 [36 RR 2d 1203] (1976). Moreover, to the extent that it seeks to incorporate by reference arguments made in its 24 page reply to exceptions, Capitol effectively violates the 10-page limitation on applications for review set forth in 47 CFR §1.115(f)(1). *See Gilbert Broadcasting Corp.*, 69 FCC 2d 2067, 2095 n. 58 [43 RR 2d 51] (Rev Bd 1978), *citing. Belo Broadcasting Corp.*, 61 FCC 2d 10, 11, ¶4 [38 RR 2d 870] (1976). We will therefore consider only those arguments specifically raised by the application for review as "examples" and not those raised only generally or by reference."

21. In any event, the Review Board correctly relied on the Commission's decision in Salvatoriello and the Mass Media Bureau's decision in Cielo to find that because the Equal Employment Opportunity and Section VII certifications are so similar, McComas' original signature on the EEO Certification was sufficient to render her application acceptable. In DaSan Communications Corp., FCC 92-487, 71 R.R.2d 1108 (1992) the Commission again considered the acceptability of an application that did not contain a signature on the Section VII certification. While the Commission denied the application for review of the dismissal of the defective application, the Commission cited the Review Board's decision in the instant proceeding with approval as it reaffirmed the rule regarding the acceptability of an executed certification of the EEO portion of an application:

In Salvatoriello we agreed with the Bureau's view that the EEO portion of Form 301 provides for a certification sufficiently similar to that called for on page 24 that they could be perceived by an applicant as functionally

equivalent. Given this potential confusion, the Commission concluded that, where an applicant signs and certifies to the EEO portion, but does not sign page 24 of the application, the application will be deemed substantially complete and tenderable. 6 FCC Rcd at 4707 (citing Cielo Communications, 3 FCC Rcd 6752 (MM Bur. 1988)). See also Rio Grande Broadcasting Co., 6 FCC Rcd 5519, 5520 (Review Board 1991).

71 R.R.2d at 1110.

22. McComas' application satisfies the criteria reaffirmed in DaSan. There is, therefore, no basis for dismissing the application. Since approval of the settlement agreement is conditioned upon that dismissal, the Request itself should be denied.

III

RGB AND UNITED HAVE NOT SHOWN THAT THE MERGED ENTITY IS FINANCIALLY QUALIFIED TO CONSTRUCT THE STATION

23. Although it is not clear, the Request appears to request that the Commission immediately grant United's application to a new entity formed by the settlement. RGB and United make no showing that this new entity has the financial qualifications to construct and operate the station. In view of the Request's reference to the enormous litigation expenses associated with this proceeding and RGB and United's determination to avoid an auction, a serious and substantial question arises as to whether the new entity has the resources to proceed with the construction and operation of the station. The Request's failure to address the issue renders it inappropriate for the Commission to grant United's application, even if such relief were available.

CONCLUSION

24. The Request should be dismissed as contrary to the terms of the Auction Order. Alternatively, the Request should be denied in view of the fact that McComas' mutually exclusive application remains pending.

Respectfully submitted,

Irene Rodriguez Diaz de McComas

By: Jerome S. Boros AS
Jerome S. Boros

By: Andrew Irving
Andrew Irving

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Her Attorneys

Dated: New York, New York
December 4, 1998

CERTIFICATE OF SERVICE

I, JUDITH JANON, a secretary in the law offices of Robinson Silverman Pearce Aronsohn & Berman LLP, do hereby certify that on this 4th day of December, 1998, I have caused to be mailed a copy of the foregoing Motion To Dismiss Joint Request For Approval Of Settlement Agreement And Opposition To Joint Requests For Approval Of Settlement Agreement to the following:

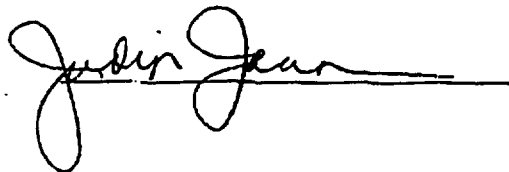
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A handwritten signature in black ink, appearing to read "Judith Janon", is written over a horizontal line.

Dated: December 4, 1998